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No. 03-1479

In the Supreme Court of the United States

PHILLIP GALLEGOS,

Petitioner,

v.

JICARILLA APACHE NATION, et al.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the United States Court of Appeals for the Tenth Circuit properly affirmed the United States District Court for the District of New Mexico's dismissal of Petitioner's complaint for relief under the Indian Civil Rights Act of 1968, 25 U.S.C. §§ 1301-1303 (2001) (ICRA) against the Jicarilla Apache Nation under the governing case law of this Court in *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978).

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STATEMENT OF THE CASE

I. Procedural Background

Petitioner Phillip Gallegos (Petitioner) filed his Complaint against the Jicarilla Apache Nation (Nation) and individual officials and employees of the Nation (JAN Defendants) on August 30, 2002 in the United States District Court for the District of New Mexico (District Court). In his Complaint, Plaintiff alleged violations of the Indian Civil Rights Act of 1968, 25 U.S.C. §§ 1301-1341 (2001) (ICRA), and violations of 42 U.S.C. §§ 1985 and 1986 (2000). Petitioner's Appendix to Petition for Writ of Certiorari at 2a–3a (Petitioner's Appendix). In his Complaint, Plaintiff sought money damages (punitive, general and special), declaratory relief, costs and attorney fees against the JAN Defendants for alleged violations of 42 U.S.C. §§ 1985 and 1986, and the ICRA. Petitioner's Appendix at 20a. Plaintiff alleged that the JAN Defendants violated the referenced statutes when Plaintiff was terminated from his position as a police officer for the Nation. Petitioner's Appendix at 19a-20a.

On September 26, 2002, the JAN Defendants filed a Motion to Dismiss Plaintiff's Complaint based on the following: (1) the District Court lacked subject matter jurisdiction over the claims due to the Nation's and the Individual Defendants' sovereign immunity; (2) Petitioner failed to state a claim upon which relief could be granted; and, (3) Petitioner failed to properly serve some of the JAN Defendants. Fed. R. Civ. P. 12(b)(1), 12(b)(6) & 12(b)(5); Petitioner's Appendix at 19a. The District Court granted the Motion to Dismiss and entered judgment against Petitioner on

November 18, 2002. Petitioner's Appendix at 19a, 34a[1]. Petitioner erroneously filed a Notice of Appeal in the United States Court of Appeals for the Ninth Circuit on December 17, 2002. His appeal was transferred by that Court to the United States Court of Appeals for the Tenth Circuit (Tenth Circuit). On November 28, 2003, the Tenth Circuit, in an unpublished Order and Judgment, affirmed the District Court's dismissal of Petitioner's case and imposed sanctions on Petitioner's attorney under Fed. R. App. P. 38 for frivolously arguing Petitioner's appeal. Petitioner's Appendix at 12a-15a.

In his Petition for Writ of Certiorari, Petitioner seeks review by this Court of only the dismissal of his claims brought under the ICRA. Petition at i (Questions Presented). Petitioner has therefore abandoned any attempt to have his claims brought under 42 U.S.C. §§ 1985 and 1986 reviewed by this Court. Sup. Ct. R. 14.1(a). Petitioner has likewise abandoned any challenge to the portion of the Order and Judgment imposing sanctions against Petitioner's attorney.

II. The District Court's Dismissal of Petitioner's ICRA Claims

The District Court dismissed Petitioner's ICRA claims based upon this Court's *Santa Clara Pueblo* opinion. Petitioner's Appendix at 22a. Relying on *Santa Clara Pueblo*, the District Court held that ICRA did not waive the

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[1] Pages 19a and 34a of Petitioner's Appendix imply that the date of the District Court's Memorandum Opinion and Order and its Judgment was September 26, 2002. That date is actually the date that the Nation filed its motion to dismiss Petitioner's complaint. The District Court issued its Memorandum Opinion and Order and its Judgment on November 18, 2002.

Nation's sovereign immunity for claims for declaratory, injunctive or monetary relief. *Id.* The District Court also rejected Petitioner's claim that the Tenth Circuit's narrowly interpreted opinion *Dry Creek Lodge, Inc. v. Arapahoe and Shoshone Tribes*, 623 F.2d 682 (10th Cir. 1980), which created an exception to this Court's *Santa Clara Pueblo* opinion, applied to this case. Petitioner's Appendix at 22a-24a.

III. The Tenth Circuit's Affirmance of the District Court's Dismissal

The Tenth Circuit affirmed the District Court's dismissal. In so doing, the Court reaffirmed that under *Santa Clara Pueblo*, the ICRA did not waive the Nation's sovereign immunity from suit for Petitioner's claims. *Id.* at 6a. The Court properly recognized the fact that "[f]ederal courts . . . lack subject matter jurisdiction to hear claims under the ICRA against Indian tribes for declaratory relief or monetary damages." *Id.* (citation omitted). In addition, the Tenth Circuit, construing its own *Dry Creek* opinion, held that the *Dry Creek* exception to *Santa Clara Pueblo* did not apply to Petitioner's claims because Petitioner had access to a tribal administrative body and his wrongful termination claims involved internal tribal affairs. *Id.* at 7a. The Tenth Circuit also summarily rejected Petitioner's argument that the Nation's constitution waived the Nation's sovereign immunity under the ICRA. *Id.* at 7a-8a.

Finally, the Tenth Circuit sanctioned Mr. Chappabitty, Petitioner's attorney, five thousand dollars under Fed. R. App. P. 38 for frivolously arguing Petitioner's appeal before the Tenth Circuit. *Id.* at 12a-15a. In particular, the Court admonished Mr. Chappabitty regarding his attempt to claim that Petitioner's civil lawsuit somehow implicated restrictions

on the Nation's criminal jurisdiction. *Id.* at 14a. In that regard, the Court stated: "It is at best bizarre, and more likely, a grave mischaracterization, to characterize the Nation's firing of [Petitioner] as an exercise of criminal jurisdiction." *Id.* Despite these sanctions, Mr. Chappabitty has again raised the issue of the scope and nature of the Nation's criminal jurisdiction as it relates to Petitioner's termination from tribal employment. Petition at 27-29.

IV. Facts

Petitioner was employed by the Nation as a police officer until he was terminated. Petitioner's Appendix at 3a (Tenth Circuit opinion); 19a (District Court opinion). Petitioner alleged in his complaint that he was terminated because he reported alleged misconduct by other police officers to federal agencies. *Id.* After he was terminated, Petitioner initiated the Nation's grievance procedure to protest his termination and a grievance hearing was held. *Id.* at 3a; 23a. Petitioner's grievance hearing and another police officer's grievance hearing were heard at the same time. *Id.* at 3a. The other police officer, who is a member of the Nation, was reinstated. *Id.* Petitioner, however, was not reinstated and the grievance panel limited his ability to present evidence at the hearing. *Id.* After the hearing, Petitioner appealed the grievance panel's decision to the Nation's Legislative Council in accordance with the Nation's code. *Id.* at 23a ("Plaintiff states in his complaint that his grievance hearing was held before a three-member panel, and Plaintiff exercised his right of appeal."); 38a.

The Petitioner's statement of the facts of this case are based upon the Complaint which was included in the appendix for Petitioner's appeal to the Tenth Circuit. Petition at 5 n.2. However, Petitioner did not include his Complaint in the

Appendix to his Petition for Writ of Certiorari. The JAN Defendants assert that the necessary and relevant facts as alleged in the Complaint are adequately described in the opinions of the District Court and the Tenth Circuit. Petitioner's Appendix at 3a-4a, 19a-23a. To the extent Petitioner now alleges facts different from the facts alleged in the Complaint and described in those opinions, the JAN Defendants deny the accuracy and relevance of such facts.

ARGUMENT

I. Reasons for Denying the Writ

Petitioner has failed to present this Court with any basis upon which to grant a writ of certiorari. Petitioner's main argument for granting the writ seems to be that this Court must require the lower federal courts to expand the scope of the Tenth Circuit's *Dry Creek* exception to this Court's opinion in *Santa Clara Pueblo*. Petition at 15. By focusing on the Tenth Circuit's *Dry Creek* decision (which the Tenth Circuit itself has never followed in the twenty-four years since it was decided), Petitioner ignores the holding of this Court in *Santa Clara Pueblo*. Petitioner's arguments assume that federal courts have the power to waive an Indian tribe's sovereign immunity without an unequivocal expression of such waiver by Congress or the tribe itself, based on a judicial balancing of interests. Petition at 18 ("[T]he circuit court has jeopardized the implementation of the only viable exception or 'escape route' from the traditional sovereign immunity bar from suits against Indian tribes in federal courts."). However, this Court has already considered the scope of Congress' waiver of tribal sovereign immunity in ICRA and has held that the ICRA is enforceable against Indian tribes in federal court only by writ of habeas corpus. *Santa Clara Pueblo*, 436 U.S. at 71; *see also Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 754 (1998) ("As a matter of federal law, an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity."); 25 U.S.C. § 1303 (2001).

The plain language of the ICRA and this Court's interpretation of that language in *Santa Clara Pueblo* unmistakably preclude Petitioner's ICRA claims against the Nation. This Court's decision in *Santa Clara Pueblo* provides

clear authority upon which to deny Petitioner's writ.

Petitioner's sole basis for finding a waiver of the Nation's sovereign immunity is his proposed extension of the Tenth Circuit's 1980 opinion in *Dry Creek*. Petition at 13. The *Dry Creek* opinion created an exception to this Court's holding in Santa Clara Pueblo for cases that meet the following elements: (1) the dispute at issue involves a non-Indian; (2) a tribal forum is not available; and, (3) the dispute at issue does not involve internal tribal affairs. *Dry Creek*, 623 F.2d at 685. This Court has never adopted the holding of *Dry Creek*, and the Tenth Circuit has never followed it. *Ordinance 59 Ass'n v. United States Dept. of the Interior*, 163 F.3d 1150, 1158-1159 (1998) ("With the exception of *Dry Creek* itself, we have never found federal jurisdiction based on the *Dry Creek* exception.").

Even if this Court were willing to recognize the Tenth Circuit's decision in *Dry Creek* as a legitimate exception to *Santa Clara Pueblo*, the Tenth Circuit has determined the *Dry Creek* elements do not apply to Petitioner's claims under the ICRA. As the Tenth Circuit itself explained regarding Petitioner's claims:

> Mr. Gallegos does not satisfy this three part test. First, Mr. Gallegos had access to a tribal administrative body, and he availed himself of that forum. Second, wrongful termination of tribal employment claims, such as that of Mr. Gallegos, are internal tribal affairs. The conclusion that tribal employment matters are internal to the tribe is bolstered when the employing tribal agency "functions as an arm of the tribal government . . . not simply [as] a business entity that happens to be run by a tribe or its members, but, rather, occupies a role

> quintessentially related to self-governance." Here, Mr. Gallegos was employed as a tribal police officer, a position central to tribal self-governance.

Petitioner's Appendix at 7a (citations omitted). Since the Tenth Circuit itself has determined that its *Dry Creek* opinion does not apply to this case, the Petition does not present an appropriate vehicle for this Court to decide whether *Dry Creek* is even good law.

As to the elements of the *Dry Creek* exception and the requirement that a tribal forum be available for the non-Indian party, there can be no doubt that the tribal administrative process was sufficient. Petitioner had access to an elaborate grievance process. Indeed, Petitioner himself admits that the Nation's administrative process is comprehensive and "provides an understandable step-by step procedure for handling employment disputes." Petition at 9. The fact that the grievance procedure is an administrative process does not affect the conclusion that Petitioner had a tribal forum available. In fact, this Court acknowledged in *Santa Clara Pueblo* that non-judicial tribunals adequately provide tribal remedies. *Santa Clara Pueblo*, 436 U.S. at 66 ("Nonjudicial tribal institutions have also been recognized as competent law-applying bodies.").

And further, despite Petitioner's extensive arguments that his employment dispute was an external matter that brings his ICRA claims within the Tenth Circuit's *Dry Creek* exception, he cannot avoid the fact that his employment with the Nation was a matter of internal tribal affairs. Petitioner's Appendix at 7a (Tenth Circuit's analysis of the nature of the dispute); *see also Penobscot Nation v. Fellencer*, 164 F.3d 706, 713 (1st Cir. 1999) ("[W]e hold that the decision of the Nation to terminate the employment of a community health nurse [who

was a non-Indian] was an 'internal tribal matter' within the meaning of the Settlement Act."). As explained above, the Tenth Circuit concluded that direct employment by an Indian tribe presumptively involves internal tribal affairs. Petitioner's Appendix at 7a.

Petitioner's attempt to make the termination of his employment a federal matter is not supported by the cases he cites. Petition at 18-26. For instance, Petitioner cites *Haddle v. Garrison*, 525 U.S. 121 (1998) for the proposition that his employment and termination were federal in nature. Petition at 21. However, in *Haddle*, the plaintiff brought claims under 42 U.S.C. § 1985(2) claiming that he was discharged as a result of a conspiracy to retaliate against him for responding to a grand jury subpoena and agreeing to testify in a criminal trial. *Haddle*, 525 U.S. at 123. *Haddle* does not address the ICRA or tribal employment matters. Therefore, *Haddle* provides no authority for Petitioner's contention that his employment and termination were federal matters that bring this case within the *Dry Creek* exception.

Petitioner finally argues that *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978) precluded the Nation from terminating Petitioner's employment based on conduct that the Nation has no criminal jurisdiction to prosecute. Petition at 27-29. This argument is so insubstantial and spurious it provided part of the basis for the Tenth Circuit's imposition of sanctions upon Mr. Chappabitty. Petitioner's Appendix at 14a. Petitioner has not challenged those sanctions, but continues to press this spurious reading of *Oliphant*. *Oliphant* in no way supports Petitioner's claim that his termination involves federal matters or federal interests.

II. The Petition Fails to Demonstrate Any Compelling Reasons to Grant the Writ

Petitioner has failed to demonstrate that any of the factors listed in Sup. Ct. R. 10 apply to this case to support the granting of the writ. Rule 10 provides three reasons, the general character of which are designed to inform litigants of the nature of the issues appropriate for certiorari review: (1) a conflict among the United States Circuit Courts of Appeals regarding an important matter of federal law; (2) the highest court of a state has decided an important issue of federal law; or (3) a state court or a United States Court of Appeals has decided an important issue of federal law that should be settled by this Court. None of these basic guidelines is fulfilled by Petitioner's Petition. Petitioner has not shown a split among the Circuits, nor has he demonstrated that this Court must settle an important issue of federal law. Indeed, as discussed above, this Court has already settled the issue of law presented by this case in *Santa Clara Pueblo*. Therefore, this Court should not grant the writ.

CONCLUSION

The Writ of Certiorari should be denied because the Petition provides no basis for granting the Writ.

Respectfully submitted:

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